Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 382

ESTELLE LATTA,
Petitioner,

vs.

WELLS FARGO BANK, a corporation,
Respondent,

HELEN KINCAID and WACHOVIA BANK AND TRUST CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the Supreme Court of the
State of California

ESTELLE LATTA,
430 - 22nd Street,
Sacramento, California 95816.
Petitioner in Propria Persona.

Subject Index

	Page
A. Opinions below	2
B. Jurisdiction	2
C. Questions presented	2
D. Constitutional provisions and statutes involved	3
E. Statement of facts	4
F. Manner and time of raising federal questions before state court	5
G. Basis for federal jurisdiction not applicable to this case	6
H. Reasons for granting the writ	6
Conclusion	7

Table of Authorities Cited

Cases

	Pages
Missouri v. Canada, 305 U.S. 337	7
Orlando v. Berkeley, 220 C.A. 2d 224	5, 6

Codes

Code of Civil Procedure:
Section 437c 3, 5, 6

Constitutions

United States Constitution:
Amendment XIV 3, 6

Statutes

28 U.S.C., Section 1257(3) 2

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Petition of Estelle Latta, in propria persona, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California.

A. OPINIONS BELOW

The trial judge sustained a motion for summary judgment, Appendix A. An appeal was taken from this judgment to the Court of Appeal, State of California, First Appellate District, Division Four. On March 15, 1968, the Appellate Court affirmed the trial Court's judgment, Appendix B. A petition for Hearing by the Supreme Court of the State of California was filed in the Supreme Court on April 22, 1968, Appendix C. This petition was denied on May 9, 1968, Appendix D.

B. JURISDICTION

i. The last judgment, Order Denying Hearing, of the California Supreme Court was entered and filed on May 9, 1968, Appendix D. All other decisions, both of the trial Court and the Court of Appeal, were prior to this date.

ii. There was no order for a rehearing, nor any order granting an extension of time within which to petition for certiorari.

iii. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

C. QUESTIONS PRESENTED

Was the petitioner denied due process and equal protection under law, as provided by the Fourteenth Amendment to the Constitution of the United States, by the granting of summary judgment although the

affidavit in support of the motion for summary judgment did not comply with strict statutory requirements?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Constitution of the United States, provides in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 437c, first and second paragraphs, of the California Code of Civil Procedure:

> "In superior courts and municipal courts if it is claimed that the action has no merit, or that there is no defense to the action, on motion of either party, after notice of the time and place thereof in writing served on the other party at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is

an appealable judgment as in other cases. The word 'action' as used in this section shall be construed to include all types of proceeding. The word 'answer' as used in this section shall be construed to include counterclaim and cross-complaint. The filing of a motion under this section shall not extend the time within which a party must otherwise file an answer, demurrer or motion to strike.

"The affidavit or affidavits in support of the motion must contain facts sufficient to entilte plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto."

B. STATEMENT OF FACTS

The respondent Wells Fargo Bank is the trustee of a certain trust fund, of which the respondent Helen Kincaid is the beneficiary. The respondent Wachovia Bank and Trust Co. is an assignee of a portion of the trust fund. Petitioner claims the trust fund as an heir of the rightful owner thereof. The Wells Fargo Bank filed an action to determine rights to said trust fund. An answer and cross-complaint claiming the trust funds was filed by this petitioner, and answers were filed by the other respondents. Respondent Helen Kincaid filed a motion for summary judgment and a defective affidavit in support thereof, Clerk's Transcript, pp. 26-30. The trial Court granted the motion

for summary judgment, Appendix A, which was affirmed by the Court of Appeal, Appendix B. The Supreme Court denied a petition for hearing, Appendix D.

F. MANNER AND TIME OF RAISING FEDERAL QUESTIONS BEFORE STATE COURT

The invalidity of Helen Kincaid's affidavit in support of her motion for summary judgment was raised for the first time in petitioner's petition for hearing in the Supreme Court. This was done by pointing out (page xiii, Appendix C) to the Court that:

> "The declaration fails to allege that facts stated were within declarant's personal knowledge, and that if sworn as a witness, she could testify competently thereto."

and citing the provisions of Section 437c, second paragraph, of the California Code of Civil Procedure, which reads as follows:

> "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto."

Reference was also made to the case of *Orlando v. Berkeley,* 220 C.A. 2d 224, which held (p. 229), in conformity with previously established law:

> "Affidavits of a party moving for summary judgment must be strictly construed, and the aver-

ments in the affidavit must state that the facts alleged are within the personal knowledge of the affiant and thus not hearsay, and that the affiant can testify competently thereto."

G. BASIS FOR FEDERAL JURISDICTION NOT APPLICABLE TO THIS CASE

H. REASONS FOR GRANTING THE WRIT

The trial Court having exceeded its jurisdiction in failing to give effect to the strict provisions and requirements of Section 437c, of the California Code of Civil Procedure, its summary judgment was a void act and a nullity.

The Court of Appeal in affirming the trial Court's judgment, gave no vitality to the trial Court's judgment. Its affirmance also is in conflict with its decision in the case of *Orlando v. Berkeley,* heretofore cited and quoted, and therefore deprived petitioner of her guaranteed rights under the "equal protection of the laws" clause in Amendment XIV to the Constitution of the United States.

A void act or judgment may be attacked at any stage of judicial proceedings. Therefore the error in granting and affirming the summary judgment was properly raised for the first time in petitioner's petition for hearing in the Supreme Court. The trial Court's summary judgment being unauthorized by Section 437c of the California Code of Civil Procedure and contrary to case law as enunciated in *Orlando v. Berkeley,* the Supreme Court of California

erred in refusing to recognize petitioner's Constitutional rights guaranteed to her by the Fourteenth Amendment.

The Supreme Court of the United States held in *Missouri v. Canada,* 305 U.S. 337:

> "Although discrimination is usually against a class of persons, a single individual may invoke the constitutional protection on a showing of unequal treatment."

CONCLUSION

"Equal protection of the laws" is a meaningless phrase if a statute, in its application, affords one of our citizens the benefits of its terms and mandates and denies the same to another litigant.

Preservation and safeguarding of petitioner's constitutional guarantee to equal treatment under law is now dependent on the issuance of a Writ of Certiorari.

This Petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
August 2, 1968.

Respectfully submitted,
ESTELLE LATTA,
Petitioner in Propria Persona.

(Appendices A, B, C and D Follow)